A

Dato Low Nam Hui v Vu Siew Chin

HIGH COURT (JOHOR BAHRU) — DIVORCE PETITION NO 47–139–1986
ALAUDDIN J
24 OCTOBER 1993

B

Family Law *— Ancillary relief — Whether application can be made after decree absolute made — Whether leave of court necessary — Divorce and Matrimonial Proceedings Rules 1980 r 56*

Civil Procedure *— Striking out — Application for ancillary relief in divorce proceedings*
C *not made in respondent's answer to divorce petition — Application filed 4½ years after decree made absolute — Whether application was scandalous and vexatious*

Family Law *— Ancillary relief — Whether respondent entitled to ancillary relief based on merits of the case*

D The petitioner and respondent were married in 1976. In 1986, the petitioner filed a petition praying for dissolution of the marriage. In 1987, the petitioner filed an amended petition. The respondent did not file an answer to either the petition or amended petition. In 1988, a decree nisi was granted to the petitioner in the presence of both the respondent and petitioner together with their respective counsel.
E Neither the respondent or her counsel made any application for ancillary relief. The decree nisi was made absolute on 11 April 1988. Thereafter, the respondent filed an appeal against the decree but withdrew her appeal. Some 4½ years later, the respondent filed an application for ancillary relief. The petitioner has applied to strike out
F the respondent's application on the grounds that: (i) the respondent's application for ancillary relief does not comply with r 56 of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules'); and (ii) the respondent's application is devoid of merit.

Held, allowing the petitioner's application:

G (1) It is obvious from r 56 of the RHC that an application for ancillary relief must be made in the petition or answer. It is a mandatory provision as the word used is 'shall'. In the event no such application was made either in the petition or answer then leave of the court is required under r 56(2)(a) of the Rules. As
H leave was not obtained, the respondent's application was defective and therefore not properly brought before the court.

(2) The respondent took almost 4 ½ years to file the application for ancillary relief and, having withdrawn her appeal against the decree of the judge, was precluded from making her present application which was made after an inordinate and unreasonably
I delay, and was scandalous or vexatious. By withdrawing her appeal, the respondent accepted the order and decree of the court.

(3) None of the assets acquired during the marriage were acquired by the joint efforts of the parties. The respondent contributed absolutely nothing to the petitioner's personal welfare or welfare of the family during the marriage and no child had been born of the marriage. The petitioner had given substantial assets to the respondent during their marriage and the respondent also had substantial assets of her own. The petitioner's allegation that the respondent had also agreed that the provision of the said assets to her was to be a 'once and for all' provision or settlement and that she would not make any claim on the petitioner's assets or ask for any maintenance, was believable. Further, the respondent's own substantial assets and financial resources were more than adequate to attend to all her reasonable needs.

[Bahasa Malaysia summary

Pempetisyen dan responden telah berkahwin pada tahun 1976. Dalam tahun 1986, pempetisyen memfailkan suatu petisyen untuk memohon supaya perkahwinan itu dibubarkan. Pada tahun 1987, pempetisyen memfailkan suatu petisyen yang telah dipinda. Responden tidak memfailkan jawapan sama ada kepada petisyen ataupun petisyen yang telah dipinda itu. Dalam tahun 1988, suatu decree nisi telah diberi kepada pempetisyen di hadapan kedua-dua responden dan pempetisyen bersama-sama dengan peguambela masing-masing. Responden mahupun peguambela beliau tidak membuat sebarang permohonan untuk relief sampingan. Decree nisi telah dibuat mutlak pada 11 April 1988. Selepas itu, responden telah memfailkan satu rayuan terhadap dekri tersebut tetapi telah menarik balik rayuannya. Lebih kurang 4½ tahun kemudian, responden telah memfailkan suatu permohonan untuk relief sampingan. Pempetisyen kini memohon untuk membatalkan permohonan responden atas alasan bahawa: (i) permohonan responden untuk relief sampingan tidak mematuhi k 56 Kaedah-Kaedah Penceraian dan Prosiding-Prosiding Hal-Ehwal Suami-Isteri 1980 ('Kaedah itu'); dan (ii) permohonan responden adalah tanpa merit.

Diputuskan, membenarkan permohonan pempetisyen:

(1) Adalah jelas daripada k 56 Kaedah itu bahawa suatu permohonan untuk relief sampingan mesti dibuat dalam petisyen atau dalam jawapannya. Ia merupakan suatu peruntukan mandatori kerana perkataan yang digunakan adalah 'mesti' ('shall'). Jika tiada sebarang permohonan seperti itu dibuat dalam petisyen ataupun jawapannya, kebenaran mahkamah diperlukan di bawah k 56(2)(a) Kaedah itu. Oleh kerana kebenaran tidak diperolehi, permohonan responden adalah cacat dan dengan itu tidak dibawa dengan betul di hadapan mahkamah.

(2) Responden telah mengambil hampir 4½ tahun untuk memfailkan permohonan untuk relief sampingan dan, oleh kerana beliau telah menarik balik rayuan beliau terhadap dekri hakim, beliau dihalang daripada membuat permohonan beliau ini, yang telah dibuat

selepas suatu kelengahan yang melampau dan tidak munasabah dan adalah mengaib atau menyusahkan. Dengan menarik balik rayuan beliau, responden telah menerima perintah dan dekri mahkamah.

(3) Tidak satupun daripada aset yang diperolehi semasa perkahwinan telah diperolehi melalui usaha bersama kedua-dua pihak. Responden tidak menyumbang apa-apa pun kepada kebajikan peribadi pempetisyen ataupun kepada kebajikan keluarga semasa perkahwinan mereka dan tidak ada anak yang dilahirkan semasa perkahwinan itu. Pempetisyen telah memberikan aset yang substansial kepda responden semasa perkahwinan mereka dan responden juga mempunyai aset yang substansial. Tuduhan pempetisyen bahawa responden juga telah bersetuju bahawa pemberian aset tersebut kepada beliau merupakan satu pemberian ataupun penyelesaian sekaligus dan bahawa beliau tidak akan membuat sebarang tuntutan ke atas aset pempetisyen atau meminta untuk sebarang nafkah, boleh dipercayai. Selanjutnya, aset substansial dan sumber kewangan responden sendiri adalah lebih daripada mencukupi untuk segala keperluan munasabah responden.]

Notes

For cases on matrimonial property, see 7 *Mallal's Digest* (4th Ed) paras 1731–1748.

Cases referred to

1 *Twiname v Twiname* (1992) 1 FLR 29 (refd)
2 *Chaterjee v Chaterjee* [1976] Fam 199; [1976] 1 All ER 719; [1976] 2 WLR 397 (refd)
3 *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin* [1984] 1 MLJ 160 (refd)
4 *Yap Kim Swee v Leong Hung Yin* [1989] 3 MLJ 55 (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 r 56

Wong Kim Fatt (Ong Ban Chai & Co) for the petitioner.
Chew Swee Yoke (SY Chew & Co) for the respondent.

Cur Adv Vult

Alauddin J: This is an application by the petitioner (encl 65) to strike out the respondent's application for ancillary relief dated 28 September 1992 (encl 50). The petitioner's application is supported by his affidavit dated 12 August 1993 (encl 64). The respondent had filed an affidavit-in-reply dated 10 September 1993 (encl 67).

The petitioner and the respondent were married on 10 May 1976. On or about 1 December 1986, the petitioner filed his petition praying for dissolution of the marriage. On 3 October 1987, the petitioner filed his

amended petition. The respondent never filed her answer to the petition or amended petition.

On 12 January 1988, when the petition came up for hearing before Mohd Yusoff Mohamed J (as he then was), a decree nisi was granted to the petitioner (encl 41). The respondent and the petitioner were present in court with their respective counsel. At or before the trial on 12 January 1988, the respondent or her counsel did not make any application for ancillary relief under r 56(2)(a) of the Divorce and Matrimonial Proceedings Rules ('the Rules'). The decree nisi was made absolute on 11 April 1988 (encl 46).

The petitioners' application is based substantially on two grounds, ie:

(1) the respondent's application for ancillary relief does not comply with the Rules, particularly r 56 and therefore is defective; and
(2) the respondent's application is devoid of merits.

On the first ground, counsel for the petitioner submitted that when the petition or amended petition was filed by the petitioner, the respondent had neglected or failed to file any answer at all to the petition. As such she had failed to comply with r 56(1) in making the application for ancillary relief. It was further submitted by counsel for the petitioner that since no answer was filed, the respondent had not complied with the requirement of r 56(2)(a) in that she had failed to obtain leave of court before making the application. As such her application is defective and should be set aside.

In response to this, learned counsel for the respondent in her submission contended that although (as she admitted) there was no answer filed to the petition, the respondent is not required to obtain leave of court to file her application for ancillary relief as her application comes under r 56(3). In the words of learned counsel for the respondent, there is an anomaly in our rules in r 56(3). She also made comparisons between our r 56 and the English r 68(1) and our Form 13 and the English Form 11. Relying on *Twiname v Twiname*[1] she concluded that there was no need for the respondent to obtain leave of court.

Rule 56 reads as follows:

(1) Any application by a petitioner, or by a respondent who files an answer claiming relief, for —

    (a) an order for maintance pending suit;
    (b) a property division order, under section 76 of the Act; or
    (c) a maintenance order, under section 77 of the Act,

    shall be made in the petition or answer, as the case may be.

(2) Notwithstanding paragraph (1,) an application for ancillary relief which should have been made in the petition or answer may be made subsequently —

    (a) by leave of the Court, either by notice in Form 11 or at the trial; or
    (b) where the parties are agreed upon the terms of the proposed order, without leave by notice in Form 11.

(3) An application by a petitioner or respondent for ancillary relief, not being an application which is required to be made in the petition or answer shall be made by notice in Form 11.

To my mind, from the reading of r 56, it is obvious that an application for ancillary relief must be made in the petition or answer. It is a mandatory provision as the word used is 'shall'. In the the event that no such application is made either in the petition or answer, then leave of court is required under s 56(2)(a). As admitted by the respondent in her affidavit that no answer was filed to the petition, she should have obtained leave of the court under r 56(2)(a). As leave was not obtained, I hold that the respondent's application is defective and is therefore not properly brought before the court.

On the contention by learned counsel for the respondent that the respondent's application for ancillary relief falls under r 56(3) and therefore no leave is required, I can only say that I disagree with her as r 56(3) never intended that leave should be dispensed with.

I shall now refer to the decision in *Twiname v Twiname*[1] where the Court of Appeal held that:

> ... the ordinary principle in civil legislation whereby a judgment, once given, was final, subject only to a right to appeal, did not apply in the matrimonial jurisdiction, ... *Subject only to the rules that required, prima facie, that the application must have been contained in the divorce petition*, the party seeking relief might come back to the court at any time and apply for additional relief or for an amendment or alteration of the award previously made. (Emphasis added.)

From this decision, it is obvious to me that it is a prerequisite that an application for ancillary relief must be made in the petition or answer. Nowhere is it stated in the judgment that where no answer was filed to the petition, leave can be dispensed with.

In the course of his judgment in *Twiname v Twiname*,[1] Purchas LJ had this to say:

> But, as will appear from the judgment of Omrod LJ in *Chaterjee v Chaterjee* [1976] Fam 199, Matrimonial Causes Rules 1977, r 68(3) provides what could be described as an anomaly:
>
> 'An application ... shall be made by notice in Form 11.'
>
> So that a respondent, who has not filed an answer and therefore comes within r 68(2) may, uninhibited and without leave, give notice of an application for such relief in Form 11.

Learned counsel for the respondent places much reliance on the above passage in trying to drive home the point that leave is not required if the respondent does not file an answer.

With respect, I must say that I cannot agree with her. His Lordship Purchas LJ was merely quoting the decision of Omrod LJ in *Chaterjee v Chaterjee*[2] and was of the opinion that r 68(3) [equivalent to our r 56(3)] could be an anomaly. This certainly was not the decision of the case as it was merely said by way of obiter. In any case, I am not bound by the decision of *Twiname v Twiname*.[1]

Having said that, I hold that on this ground alone the petitioner should succeed in his application.

Assuming that my decision on the first ground is wrong, I feel that the petitioner should succeed on the second ground for the following reasons:

(1) It must be observed that the respondent took almost 4½ years to file her application for ancillary relief. The learned judge, when granting the decree of dissolution of marriage on 12 January 1988, saw it fit and proper not to order the division of any assets acquired by the joint efforts of the parties under s 76(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') or by the sole efforts of the petitioner under s 76(3) of the Act. The respondent, having withdrawn her appeal against the decree of the learned judge, is now precluded from making her present application, which was made after an inordinate and unreasonable delay.

(2) Having read the affidavits of both parties, I am of the view that there were no assets acquired during the marriage by the joint efforts of the parties. All the assets of the petitioner were acquired by him by his own efforts (see encl 64). The respondent contributed absolutely nothing to the petitioner's personal welfare or the welfare of the family during the marriage. No child was born of the marriage (see para 8 encl 64).

(3) From the affidavits of both parties, it would appear to me that the petitioner had given substantial assets to the respondent during their marriage and the respondent also had substantial assets of her own. For this reason I am inclined to believe the petitioner's allegation (see encl 64 para 4) that the respondent had agreed that the provision of the said assets to her by the petitioner was to be a 'once and for all' provision or settlement and that she would not make any claim on the petitioner's assets or ask for any maintenance. That was the reason why the respondent, though represented by her own solicitors, did not file her answer or raise any issue on ancillary relief.

(4) During the hearing of the petition on 12 January 1988, the respondent and the petitioner were present together with their counsel. The respondent later withdrew her appeal against the order and decree of the learned judge in 1990, thereby accepting that order and decree of the High Court. In this connection, I would refer to paras 11–14 of the respondent's affidavit dated 28 August 1992 (encl 51). I find that the excuses given by her are not at all plausible. (See *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin.*[3])

(5) With reference to para 10 of the respondent's affidavit (encl 51), it was alleged that the marriage broke up because the respondent found out that the petitioner was keeping mistresses. To my mind, if her allegations were true, then it was open for her to petition for divorce on this ground which she did not do. By her action, she had condoned the petitioner's conduct. In my judgment, the sole and real cause for the irretrievable breakdown of the marriage was due to the respondent's behaviour, attitude and conduct towards the petitioner (see encl 64 para 8). (See *Yap Kim Swee v Leong Hung Yin.*[4])

(6) I am also of the opinion that the respondent's own substantial assets and financial resources are more than adequate to attend to all her reasonable needs. She has no justification or need for the petitioner's maintenance, as she had lived well by her own financial means during the last five years. The respondent does not have to support any

children of her own as they have all grown up and have obtained professional qualifications. This fact was never disputed by the respondent.

(7) It would appear to me that the respondent's allegations for the first time of love and care for the petitioner in paras 19 and 20 (see encl 67) are only merely afterthoughts and are not bona fide. Such allegations were never made in her affidavit in support of her application for ancillary relief.

(8) I hold the view that it is scandalous or vexatious for the respondent to make her application for ancillary relief over 4½ years after the learned judge had granted the decree of divorce on 12 January 1988.

For reasons best known to her, learned counsel for the respondent did not make any submission on the merits of the respondent's application.

In view of the above reasons, the petitioner's application for an order that the respondent's application for ancillary relief dated 28 September 1992 be struck out with costs, is hereby allowed.

Application allowed.

Reported by Premala Pathmanathan